IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 517 of 1994

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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HIRABHAI JHAVERBHAI
Versus
STATE OF GUJARAT

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Appearance :
MR AJ DESAI, ADDITIONAL PUBLIC PROSECUTOR for the Opponent

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 14/09/2006

ORAL JUDGMENT

1. Yesterday, i.e. 13.09.2006, this matter was on board and the Court passed the following order:

> “The matter was on board. Yesterday, Mr.H.N.Jhala, learned advocate for the appellant was not available to proceed with the matter. The matter was kept today. It is reported that Mr.Jhala has filed leave note for day. Let the matter be listed on 14/09/2006.”

Today when the matter is called out, Mr.H.N.Jhala, learned advocate for the appellant is not present. It being 1994 matter and there being no request from the learned advocate for the appellant, the matter is proceeded with.

2. The facts of the case are that on 23.07.1986 in the evening hours around 7 O'clock when the complainant – Mohan Jadav was going to scold, accused No.1 – Hira Jhaver and his son, who in the morning hours, i.e. around 10.00 AM had given blow with pipe to the uncle of the complainant – Kanji Jivraj, who informed the complainant about the said incident. Accused No.1 – Hira Jhaver was near the flour mill of one Shri Rajubhai and he was having Dhariya in his hand by which he gave one blow which fell on the upper part of right ear. The accused had also given the second blow which had fallen on the right forearm. Due to this, the complainant had fallen down. At that time, other 6-8 persons, armed with sticks and Dhariyas had come and started beating the complainant and the uncle of the complainant – Kanjibhai, who was also with the complainant. A complaint was filed.

The police had carried out Panchnama of scene of offence. The police made an inquest Panchnama of the injured complainant. The police recovered weapons from the accused, arrested them and after making necessary

investigation, filed charge sheet in the Court of learned Judicial Magistrate First Class, Botad.

The learned Judicial Magistrate First Class, Botad committed the case to Sessions. Learned Assistant Sessions Judge, Bhavnagar framed charge against the accused being Exh.4. The same was read over and explained to the accused. The accused pleaded, 'not guilty', hence the case was tried.

3. The case of the defence is of total denial. In the cross-examination in the alternative it is alleged that the complainant and other persons had caused injuries to accused No.1 and his brother – Vitthal Jhaver – accused No.2; that the present complaint is filed only with a view to get out of the complaint filed against him.

4. In this case the prosecution examined following witnesses:

(I)Mohanbhai Jadavbhai (complainant) at Exh.24.

(II)PW2 – Valji Kanji at Exh.26.

(III)Mahipatsinh Udesinh Gohil (Head Constable) at Exh.29.

The prosecution also relied upon following documentary evidence:

(I)Complaint at Exh.25.

(II)Medical (Injury) Certificate at Exhs.33 and 34.

5. The learned Additional Sessions Judge, Bhavnagar, taking into consideration the evidence convicted accused No.1 for an offence under Section 324 of the Indian Penal Code. So far as other accused are concerned, the learned Judge was pleased to acquit them in absence of sufficient evidence on record, giving them benefit of doubt.

Accused was heard before awarding the sentence. After hearing the accused, 6 months simple imprisonment, fine of Rs.250/- and in default, 15 days imprisonment was awarded. The learned Judge has also ordered that the accused should be given benefit of set-off. The learned Judge was pleased to grant no separate sentence for an offence under Section 135 of the Bombay Police Act.

6. Being aggrieved by the said judgment and order, the accused filed present appeal before this Court. The appeal was admitted on 18.05.1994. The Court was pleased to pass the following order:

> “Appeal admitted. Same bail, fresh bonds. Direct service permitted.”

7. With the assistance of Mr.A.J.Desai, learned Additional Public Prosecutor, the Court perused the 'charge' framed against the accused – Exh.4, the complaint – Exh.15. From the complaint, motive for the offence is apparent. On the date of the incident, i.e. 23.07.1986 at about 10.00 AM uncle of the complainant –

Kanjibhai Jivrajbhai was going to his field. At that time, accused No.1 – Hira Jhaver and his son met him and gave him blow with pipe on his left leg and on the back. Uncle of the complainant talked about that incident to the complainant. In the evening, around 07.00 PM, the complainant and his uncle while going to the accused – Hira Jhaver to scold him for the morning incident, he met at the flour mill of Rajubhai. At that time, the accused got enraged and started abusing the complainant and gave blows with Dhariya. One blow, aimed at the head of the complainant, fell on the right ear, the second blow landed on the right forearm of the complainant. The complainant sustaining the injuries, fell down. Thereafter, he was beaten by 7-8 persons, who had come armed with sticks and Dhariyas. They had also beaten his uncle.

The deposition of the complainant is examined. He has deposed that when he, his uncle and his uncle's son were going to the residence of Hira Jhaver (accused No.1), the accused had met them at flour mill. In the process of scolding, accused No.1 got enraged and he gave Dhariya blow. It is further deposed that thereafter, blow of Dhariya by Hira Jhaver (accused No.1) had fallen on Vitthalbhai (brother of accused No.1 – accused No.2) and blow of Vitthalbhai had fallen on Hira Jhaver. It is then deposed that after the incident, the complainant

came back to his residence. His complaint was taken by the police in Botad hospital. The complaint is produced at Exh.25. Exh.25 and 15 are the same. In the cross-examination it comes on record that uncle of the complainant – Kanjibhai and accused No.1 have some dispute regarding right of way; that on the day of the incident, in the morning, there was some quarrel between accused No.1 and the uncle of the complainant; that in the evening at 5 O'clock, the uncle of the complainant had informed the complainant about the morning incident.

Though there is no mention about cross complaint and a Criminal Case arising from such complaint, in Appeal Memo it is mentioned that:

> "8. The original accused Mohan Jadav and one another who have been convicted in the Cross complaint in Sessions Case no.130/87 has preferred a criminal appeal no.480/94 against the conviction for offence U/s 307 IPC and sentence of five years R.I. The said appeal has been admitted by the Honourable High Court on 5.5.94 by Honourable Justice Shri C.V.Jani and the original accused Mohan Jadav in Sessions case no.130/87 has been released on bail."

In cross-examination of the complainant, the complainant has deposed that the first blow of accused No.1 had fallen on the complainant whereas, the second blow had fallen on Vitthalbhai – brother of accused No.1. It is also deposed that as blow of Hirabhai – accused

No.1 had fallen on the head of Vitthalbhai, Vitthalbhai had fallen down unconscious. It is deposed that as it was dark, blows of one another had fallen on each other and Hirabhai had also sustained injury.

8. The prosecution has also examined Valji Kanji – son of the uncle of the complainant as PW2 at Exh.26. This witness has deposed that in the evening at about 07.30 to 08.00, after everybody returned from field, when the complainant along with other persons was going to the residence of Hira Jhaver – accused No.1 for scolding, Hira Jhaver, they met him near the flour mill of Rajubhai. At that time, thee was exchange of hot words and abuses and as there was no light and it was dark, blows of each other had caused injuries.

9. The prosecution has also examined Kanjibhai Jivrajbhai – uncle of the complainant as PW3 at Exh.27. He is declared hostile.

10. Mahipatsinh Udesinh Gohil is examined as PW4 at Exh.29. At the relevant time, he was serving as Head Constable at Botad Police Station and he had received Yadi from Medical Officer, Botad. He had gone to the hospital and the complaint was recorded. P.S.O. (Police Station Officer) had entrusted the investigation to Police Sub Inspector (P.S.I.)Shri Parmar. This witness has deposed that P.S.I. Shri Parmar had carried out the Panchnama of scene of offence, recorded statements of the

concerned witnesses, had also recovered Muddamal, had arrested the accused and had filed the charge sheet.

11. Exhs.33 and 34 – Injury Certificates of the complainant and his uncle are examined. In Injury Certificate at Exh.33, in all, 5 injuries are recorded, of which, first injury is described as, “Incised wound with fracture cartilage”. Injury No.2 is, “Incised stab wound.” and other 3 injuries are “Red Bruise”. Except mentioning the word, “fracture” in this Injury Certificate, no other evidence in support thereof is on record of the case. So far as injuries to the uncle of the complainant is concerned, they are only in the nature of, “Red Bruise and central Alorasion”.

12. The defence has examined Shri Rajubhai Alibhai as their witness being DWS at Exh.36. This witness has given altogether different versions and has deposed that the complainant along with 11-12 other persons had come and started beating Hirabhai – accused No.1, on his getting out of the flour mill. He has further deposed that he and his sister both intervened to rescue accused No.1. He has deposed that Hirabhai – accused No.1 sustained injury on right shoulder. He has also deposed that his sister sustained injury on her right shoulder. He has deposed that the present complainant gave Dhariya blow to Vitthalbhai – accused No.2 (brother of accused No.1).

13. The learned Judge has taken into consideration the evidence on record and the factor that accused No.1 himself had produced the weapon and the Panchnama of recovery of that weapon is admitted. The learned Judge has taken into consideration that as the presence of other persons is not established, the case of unlawful assembly is not proved beyond doubt. The learned Judge has also taken into consideration that injuries, if any, sustained by accused No.1 are not supported by any medical evidence by the defence and therefore, the learned Judge refused to accept the arguments made in this regard. He has also refused to accept the case of the defence that the complainant and other persons had gone to cause injuries to the accused, in absence of any evidence about the injury sustained by accused No.1.

14. The learned Judge has taken into consideration admission of the learned advocate for the accused, who has admitted the complaint Mark 14/1, which is then exhibited as Exh.15. The learned Judge has then stated that as once the complaint is admitted, wherein it is stated that accused No.1, after having enraged and abused, gave blow on the head of the complainant and on the right forearm, which is supported by medical evidence – Exh.33, there are ample circumstances to convict accused No.1 for an offence punishable under Section 324 of the Indian Penal Code. The learned Judge has then

considered the aspect that so far as say of the complainant is concerned, it is supported by medical evidence, as against that, say of the defence is not supported by any medical evidence and therefore, the same is not believed. The learned Judge has also considered that if at all it is the say of the accused No.1 that he had sustained injury, such say ought to have been substantiated by producing medical evidence.

The learned Judge after taking into consideration all the relevant material has recorded conviction and awarded sentence which is challenged in this appeal.

15. This Court, having appreciated the evidence and having gone through the documentary evidence on record of the case, finds no substance in this appeal hence, it is dismissed.

(RAVI R.TRIPATHI, J.)

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